SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. ———

JAMES STEVE HAWKINS - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES SIXTH CIRCUIT COURT TO THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. ———

JAMES STEVE HAWKINS - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES SIXTH CIRCUIT COURT TO THE SUPREME COURT OF THE UNITED STATES

May it please the Court:

Petitioner, through his attorney, prays that a Writ of Certiorari be issued to review the holding of the United States Sixth Circuit Court in the above styled action. On January 13, 1972, the United States Court of Appeals, Sixth Circuit, overruled petitioner's Motion for Rehearing. The United States District Court sentenced petitioner to three (3) years in prison, and the United States Sixth Circuit Court of Appeals, on December 14, 1971, upheld the lower court. A timely Motion for a Rehearing was filed but was denied on January 13, 1972. Petitioner now lodges this Writ with the Supreme Court of the United States.

JURISDICTION

28 USC Section 1254 (1).

The Fifth Amendment of the United States Constitution, Double Jeopardy Clause

QUESTIONS PRESENTED

1. Was the doctrine of *United States* v. *Jorn*, 400 U. S. 470, 91 S. Ct. 547, 27 L. Ed. 2d, 543 (1971) violated?

OPINION BELOW

The District Court rendered no Opinion and the Circuit Court in their Order (unreported opinion) denied our request to reverse the lower Court. The Sixth Circuit Court did not render a written Opinion but did issue a written order (App. page 13).

STATUTES INVOLVED

Double Jeopardy Clause of the United States Constitution 2813 U.S.C. 2314.

STATEMENT

This case originated in the United States District Court, Western District of Kentucky, before the Hon. Judge Gordon. The jury was impaneled and sworn and jeopardy had attached. Shortly afterward one of the jurors notified the court that he had misunderstood a question on voir dire. The juror stated that he

should have replied affirmatively to a question concerning whether or not he had been an employee of the company upon whose bank account the forged checks were drawn.

The court then ordered a mistrial. Defendant-Petitioner did not move for a mistrial, but the Court, on its own, succeeded to declare it anyhow. Subsequently, counsel for petitioner filed a motion directing that the case be dismissed because a retrial of petitioner would constitute a double jeopardy violation. (See documentation of the Motion to Dismiss and the Government's answer.) The Court overruled said motion. Petitioner, the double jeopardy clause not withstanding, was retried; he was found guilty of violating 18 USC 2314 and received two (2) three (3) year sentences which would be served concurrently.

REASON FOR GRANTING WRIT

Petitioner believes that the recent Supreme Court case of *Jorn* v. *United States,* 27 L. Ed. 2d 543, was flagrantly violated. The Court in their order of December 14, 1971, stated that a declaration of a mistrial was manifested because the Court was anxious to protect the rights of the defendant-appellant, and consequently, was a proper exercise of discretion by the trial judge.

We sincerely appreciate the fact that the Court has good intentions; however, *Jorn* v. *United States, supra* is not concerned with the good intentions of the Court. This case is only concerned with the double jeopardy

clause of the United States Constitution. The Argument below, which is a brief synopsis of the facts and an analysis of the *Jorn* case repudiates the Court Order.

Essential facts are that after the jury was impaneled, one of the jurors informed the Judge that he worked for the alleged victim in this case. He at no time said that this would prevent him from giving the defendant a fair trial. Before defense counsel or prosecution could do anything the Court immediately discharged the jury. The unconverted facts are that the defendant did not move for a mistrial and this abortion of the judicial proceedings was entirely at the behest of the Judge. *United States* v. *Jorn, supra* familiar to the panel is the principle basis of our authority. In a broad prospect Jorn's case was similar to the *Hawkins* case. The Court on the double jeopardy and speedy trial provisions of the U. S. Constitution sustained defendant's argument. It is our contention that the Court abused its discretion by declaring a mistrial. The Court to some extent relied on a *socialogical utilitarian* approach in this matter. The Court held that unless there is a manifest necessity or unless a mistrial is brought about because of the conduct of the accused then a Court cannot declare a mistrial as it did in this case. In *Jorn's* the Court was annoyed because the witnesses were not warned and declared a mistrial because of the government. In this case the government should have asked the jurors if they had ever worked or were stockholders or in any way connected with the victim. This is one of the most elementary questions

asked on the voir dire examination. The Court held that subjecting the defendant to (1) embarrassment, (2) expense, (3) ordeal, (4) anxiety, (5) insecurity, and (6) possibility of being innocent being found guilty were all reasons of tort and flustered government attempts to re-try the accused. Some circumstances obviously would warrant a retrial but this is not one. The government cannot show manifest necessity for the act. The problems mentioned above (1-6) clearly reflect that the mistrial granted was not in the sole interest of the accused. Regardless of the good intentions of the Court and regardless of the fact that the Court displayed a lack of legal knowledge in this area, the defendant will still be subjected to the same personal strain and insecurity. Well-intentioned people often enlarge and amplify problems instead of abating them. This is exactly what happened here. The source of the problem is the intended beneficiary of a ruling or needs can be taken in consideration but are not of personal concern.

In conclusion the Judge acted too hastily, he should have conducted a detailed inquiry; he never gave anyone a chance to object; the defendant did not force the problem; no manifest necessity for action; and government to prove manifest necessity should have obtained an *affidavit from juror stating he could not give the defendant a fair trial and would have swayed jurors to the contrary. The affidavit further should have discussed his relationship with the company in detail, his loyalty to the company, his present relationship with the company, his financial interest in the company and*

so on. The government has the burden of proof of showing manifest necessity. Who knows, maybe the juror disliked the company and would have sided with the defendant because of this.

The following language taken from *United States* v. *Jorn*, 27 L. Ed. 2d 543, states our position. "It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial. *United States* v. *Perez*, 22 U. S. (9 Wheat) 579, 580, 6 L. Ed. 165, 166 (1824). Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment.

CONCLUSION

If Supreme Court Decisions are to have any meaning, it is imperative that this Court agree to hear this case; and in a percuriam opinion, summarily reverse the holding of the United States District Court and the United States Circuit Court.

Respectfully submitted,

DAVID KAPLAN and
STUART L. LYON
808 Center Building
522 West Jefferson Street
Louisville, Kentucky 40202
Attorneys for Petitioner

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

United States of America

v.

James Steve Hawkins

No. 27546
(18 U.S.C. § 2314)

MOTION TO DISMISS

Comes the defendant, James Steve Hawkins, and by his counsel moves the Honorable Court to dismiss the herein indictment and charges on the grounds of double jeopardy.

David Kaplan
808 Center Building
522 West Jefferson
Louisville, Kentucky
584-0143
Attorney for Defendant

It is hereby certified that a copy of the foregoing was mailed the day of , 1971 to George J. Long, United States Attorney, Federal Building, Sixth & Broadway, Louisville, Kentucky.

David Kaplan

Motion having been and argument of counsel having been made it is hereby ordered by this Court that Indictment # 27546 against James Steve Hawkins is dismissed.

Judge

Dated

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

United States of America
v.
James Steve Hawkins

Criminal No. 27546

RESPONSE OF THE UNITED STATES TO MOTION TO DISMISS

Comes the United States of America, by counsel, A. Duane Schwartz, Assistant United States Attorney for the Western District of Kentucky, and for its response to James Steve Hawkins's Motion to Dismiss, states:

1. On March 15, 1971, the defendant plead not guilty to a two count indictment charging him with interstate transportation of a falsely made and forged security in violation of 18 U.S.C. 2314. Based on the defendant's not guilty plea the case was assigned to trial on April 6, 1971. On April 6, 1971 after selection of the jury and opening statement, the first witness for the United States was called and while taking the stand a member of the jury stood up and indicated he had made a mistake and wished to ask a question.

Outside the hearing of the jury, the District Judge, counsels for the United States and the Defendant, and the jury member met and discovered that the jury member had once been an employee of a company on which the forged checks were drawn. The defendant's counsel indicated to the Court that the defendant would not waive the fact that this was not brought out on voir dire and the Honorable

District Judge then released the jury and declared a mistrial.

2. It is clear from the facts presented that the defendant's motion is unfounded. The mistrial was declared solely in the Defendant's interest by the District Court Judge.

3. When a mistrial is declared in the Defendant's interest, there is no abuse of the Court's discretion and the retrial doesn't constitute double jeopardy. *Cori* v. *United States*, 367 U. S. 364 (1961).

4. Clearly the facts of the mistrial supported by law show that double jeopardy is not an issue. *Featherston* v. *Mitchell*, 418 F. 2d 582 (5th Cir. 1969); *United States* v. *Reeves*, 293 F. Supp. 213 (D.C.D.C. 1968); *Hernandez* v. *Nelson*, 298 F. Supp. 682 (D.C. Cal. 1969); *Grogan* v. *United States*, 394 F. 2d 287 (5th Cir. 1967); *McKissick* v. *United States*, 379 F. 2d 754 (5th Cir. 1967); *Howard* v. *United States*, 372 F. 2d 294 (9th Cir. 1967); *Augenblick* v. *United States*, 377 F. 2d 586 (Ct. Cl. 1967); *Oelke* v. *United States*, 389 F. 2d 668 (9th Cir. 1967); *United States* v. *Davis*, 369 F. 2d 775 (4th Cir. 1966); *United States* v. *Armco Steel Corp.*, 252 F. Supp. 364 (D.C. Cal. 1966); *United States* v. *Cording*, 290 F. 2d 392 (2nd Cir. 1961).

Wherefore, the United States, by counsel, prays that defendant's motion to dismiss be overruled.

United States of America
George J. Long
United States Attorney

By A. Duane Schwartz
Assistant U. S. Attorney

No. 71-1536

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

United States of America - - Plaintiff-Appellee

v.

James Steve Hawkins - - - Defendant-Appellant

ORDER—Filed Dec. 14, 1971

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

This appeal having come on to be considered on the record on appeal and on the briefs and oral arguments of counsel for the parties, and the Court having concluded that the purpose of the declaration of a mistrial in the District Court was the protection of the rights of the defendant-appellant and was a proper exercise of discretion by the trial judge,

It Is Ordered that the judgment of the District Court be and it hereby is affirmed.

Entered by Order of the Court
(s) James A. Higgins, Clerk

No. 71-1536

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

United States of America - - Plaintiff-Appellee

v.

James Steve Hawkins - - Defendant-Appellant

ORDER—Filed Jan. 13, 1972

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

Upon consideration, it is ORDERED that the petition for rehearing be and it hereby is denied.

Entered by Order of the Court
(s) James A. Higgins, Clerk

SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAR 7 1972
E. ROBERT SEAVER, CLERK

No. 71-1008

In the Supreme Court of the United States

OCTOBER TERM, 1971

JAMES STEVE HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1008

JAMES STEVE HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on two counts of having knowingly transported falsely made or forged securities (checks) in interstate commerce, in violation of 18 U.S.C. 2314. He was sentenced to concurrent prison terms of three years. The court of appeals affirmed by order, denying petitioner's claim that a previous declaration of a mistrial on the same charge had barred further prosecution under the double jeopardy clause of the Fifth Amendment (Pet. App. 12).

The events leading to the declaration of a mistrial are undisputed. Following the empanelment of the

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jury and the opening statements of counsel, a member of the jury stood up and indicated he had made a mistake and wished to ask a question. Outside the hearing of the other jurors, the juror stated that he had misunderstood a question on voir dire and that he had in fact once been an employee of a company on which the forged checks were drawn. Petitioner's counsel told the court that his client would not waive the fact that this was not elicited on voir dire and thus refused to forego possible challenges to the juror's presence. The district judge thereupon on his own motion declared a mistrial.

Petitioner argues, as he did below, that this action precluded further prosecution under the principles announced in *United States* v. *Jorn*, 400 U.S. 470. As the court of appeals held, however, the district judge did not abuse his discretion in declaring a mistrial in these circumstances. The juror's revelation that he was once connected with the victim of the crime afforded an adequate basis for a conclusion that the interests of justice would be best served by trial before a different jury. See *Simmons* v. *United States*, 142 U.S. 148; *Oelke* v. *United States*, 389 F.2d 668, 671 (C.A. 9), certiorari denied *sub nom. Graves* v. *United States*, 390 U.S. 1029. While petitioner did not formally move for a mistrial, his counsel's indication that he would not waive any objection to the continued participation of the juror in the trial limited the trial court's

options.[1] As the plurality opinion in *Jorn* recognizes, a mistrial may be declared by the judge on his own motion when "a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." 400 U.S. at 485 (opinion of Mr. Justice Harlan).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

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[1] Although the record is silent on the matter, we are informed by the Assistant United States Attorney who tried the case that there were no alternate jurors. While under Fed. R. Crim. P. 23 (b) the parties could have stipulated to a trial by a jury of less than 12, this option does not appear to have occurred to petitioner's counsel, the government or the district court.

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